No. 82-2042

In The
Supreme Court of the United States
October Term, 1983

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

vs.

CHRISTINE VAUGHN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

(1) When a generalized *prima facie* case has been rebutted by defendant's proof of a specific nondiscriminatory reason for the employment action, is the plaintiff required to present evidence concerning the particular conduct in issue in order to establish pretext?

(2) Whether the district court's application of generalized evidence from the *prima facie* case to meet plaintiff's pretext burden effectively foreclosed defendant's opportunity to rebut the inference drawn from the *prima facie* case, and was therefore clearly erroneous or inconsistent with previously enunciated legal standards?

(3) When discriminatory animus has been shown to have been a factor in the decision, may the defendant overcome a finding of discrimination by establishing that the challenged employment decision would have occurred in any event, even absent the discrimination?

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The opinion of the United States Court of Appeals for the Eighth Circuit appears in Appendix A to the Petition for Certiorari and is reported at 702 F. 2d 137 (8th Cir. 1983). The opinion of the United States District Court for the Eastern District of Arkansas, Richard Sheppard Arnold, Circuit Judge, sitting by designation, appears in Appendix B to the Petition for Certiorari, and is reported at 523 F. Supp. 368 (E. D. Ark. 1981).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit (Pet. App. C, pp. C-1 - C-2) was entered on March 11, 1983. The petition for a writ of certiorari was filed on June 8, 1983 and was granted on October 17, 1983. The Court's jurisdiction rests upon 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§ 2000e-2. *Unlawful employment practices—Employer practices*

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e-5(f) and § 2000e *et seq.*, and under 28 U. S. C. § 1343(4). (JA 5). The dispute arose when the respondent, Ms. Christine Vaughn, a black female employee, filed suit along with two other plaintiffs alleging among other things that she was disqualified in 1971 as a sealex machine operator because of her race by the petitioner Westinghouse Electric Corporation. At the conclusion of a trial to the court, the district court found against the two other plaintiffs on their claims (JA 333, 335) and found against Vaughn on all of her claims except the single claim regarding her disqualification as a sealex machine operator. (JA 336, 338). The claims of the other plaintiffs were not the subject of an appeal, and are not before this Court.

Ms. Vaughn was hired by Westinghouse on July 13, 1970, as a sealex machine operator on the second shift, labor grade four, at the wage rate of $2.20 per hour. (JA 292, DX 35v). She received rate increases in accordance with the collective bargaining agreement (JA 266-68, DX 2) (DX 35q-u) until she reached the top pay rate for her classification on November 16, 1970. (JA 287, DX 35q). On that same day, she was transferred to Mr. Oscar D. Brazil's section, and was again transferred on January 25, 1970 to the third shift due to a reduction in force. (JA 286, DX 35p). She continued in that position on the third shift under the supervision of Mr. Clint T. Turnage until April 19, 1971, when she was disqualified as a sealex machine operator by Mr. Turnage and placed on an open labor grade one position, bulb loader-hand, resulting in a loss of pay of $.24 per hour. (JA 285, DX 35o). She remained from that time in the employ of Westinghouse and

at the time of trial held the rate of labor grade three at $5.40 per hour. (JA 271, DX 35a).

At the time Ms. Vaughn was transferred from sealex machine operator on the second shift, her section supervisor, Mr. Brazil, evaluated her quantity and quality of production as poor and recommended that she not be rehired in that position. (JA 293-94, DX 36) (dated January 20, 1971). Two days before that evaluation, Mr. Brazil had signed a personnel form which reflected that Ms. Vaughn was to be placed as a sealex machine operator on the third shift, and which contained an entry that Ms. Vaughn had had "previous satisfactory experience" in that position on the second shift. (JA 295, DX 36). Mr. Brazil also testified that he had warned Ms. Vaughn about her poor performance and attendance problems (JA 245). Ms. Vaughn did not dispute this testimony, although her main complaint related to Mr. Brazil. (JA 52).

On the third shift, under Mr. Turnage's supervision, Ms. Vaughn was verbally warned on five separate occasions, four times in the presence of a union shop steward, that her production was unacceptable because of an inadequate number of lamps sealed and too many burnt wires. These verbal warnings were noted in writing by Mr. Turnage, and his notes were made a part of the trial record. (JA 296-311, DX 37-40). On April 19, 1971, Ms. Vaughn was disqualified from her job as sealex machine operator. (JA 285, DX 350). The disqualification form noted that she could not hold this job in the future and stated that although she got along well with others and had good attendance, her work quality and quantity were poor, the supervisor was unable to motivate her, and she showed no interest in the job as a sealex machine operator. (JA 312-13, DX 41).

Ms. Vaughn did not dispute that she had some problems on the third shift, but she did testify that Turnage had never warned her of her poor production. (JA 44). She stated that he had given her assistance (JA 44); that he told her she had been disqualified by a notice from the front office (JA 51); and that she did not think Turnage acted because of her race, although "it's possible" that he or someone else had (JA 51-52). Ms. Vaughn did not file a grievance with the union over the disqualification (JA 42). Ms. Vaughn apparently never again bid on or sought a sealex machine operator position, even though she was unaware that she was precluded from doing so, and at trial considered herself a "qualified sealex operator." (JA 28). In a skills survey conducted in 1976 by the company for all female employees, Ms. Vaughn listed only "utility operator," and not sealex machine operator, as a higher-paying job she was qualified for. (JA 317, DX 49c).

The district court originally held that the plaintiffs had established a prima facie case of racial discrimination under the rationale of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Vaughn v. Westinghouse Electric Corp.*, 471 F. Supp. 281, 286 (E.D. Ark. 1979). (JA 324). That finding was based primarily upon a finding of low black representation in non-production jobs, including supervisory and management positions, an apparent but unexplained adverse impact upon black applicants in the Defendant's hiring and discharge decisions, (JA 326-8), testimony by Ms. Wilma Donley that black employees were mistreated in the plant, (JA 328-9), and the proof that Ms. Vaughn had held the position, was disqualified, and a white employee replaced her. (JA 336-37). The district court then held, with respect only to Ms. Vaughn's

disqualification, that Westinghouse had failed to demonstrate proof sufficient to overcome plaintiffs' prima facie case. (JA 337, as modified by Order of May 23, 1979, JA 339-40).

From that judgment, Westinghouse appealed, alleging that the district court had misapplied the burdens of proof. The Court of Appeals for the Eighth Circuit affirmed in a two-to-one majority decision. 620 F. 2d 655 (8th Cir. 1970) (JA 346).

On March 9, 1981, the Court granted Defendant's petition for certiorari, summarily vacated the judgment and remanded the case to the Court of Appeals for further consideration in light of *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981). (JA 360-61). The Court of Appeals remanded with the same directions to the trial court. (JA 361-62). On remand, the trial court[1] held that, even though it was in error in placing too great a burden on the Defendant, after reviewing the record as a whole, its original finding of discrimination against Vaughn should be reaffirmed. (Pet. App. B). The Court awarded $1,696.25 plus interest to the plaintiff, representing back pay to and including May 30, 1979, (JA 375), $1,087.25 in costs, and $15,730.00 in attorney's fees. (JA 376). This was later amended to add $29.46 in back pay. (JA 378). Westinghouse again appealed, challenging the trial court's finding that the reasons articulated for the disqualification were pretextual. In another two-to-one majority decision the Court of Appeals affirmed, holding that the district court's finding of pretext was not clearly erroneous. (Pet. App. A). The Court of Appeals awarded

[1]The trial judge, Honorable Richard S. Arnold, had in the interim between the original trial and the remand been elevated to the Court of Appeals for the Eighth Circuit. He heard the case on remand as Circuit Judge sitting by designation.

costs to Vaughn in the amount of $57.00, and additional attorney's fees in the amount of $7,275.00.

SUMMARY OF ARGUMENT

In the seminal decision on disparate treatment cases under Title VII, *McDonnell Douglas v. Green,* 411 U. S. 792 (1973), the Supreme Court created the groundrules for the order and allocation of proof. The Court established a minimum threshold for the prima facie case, and set the requirements necessary to overcome it. Then, said the Court, the plaintiff was to be given an opportunity to establish that the legitimate reasons given by the defendant as the basis for the employment decision were a pretext for discrimination. The Court outlined generally the nature of evidence that could be used to show pretext, *id.* at 804-05, but cautioned that general determinations should not be controlling in the face of an otherwise justifiable reason for the conduct. *Id.,* n. 19.

In *Furnco Construction Corp. v. Waters,* 438 U. S. 567 (1978), the Court described the plaintiff's treatment burden as a requirement to show that he was treated less favorably than others because of his race. The Court again held that, while generalized statistics may have some relevance to motivation, they were not conclusive. *Id.* at 578. The Court clarified in *Board of Trustees of Keene State College v. Sweeney,* 439 U. S. 24 (1978) that because the plaintiff retained the burden of persuasion, a defendant was not required to prove the absence of discriminatory motive.

Even though the law appeared to be clear, district and circuit courts still had problems with the second stage burden of the defendant employer. The courts expressed

an unwillingness to allow the presumption arising from the prima facie case to be rebutted by simple articulation of a facially valid reason, and sought to impose a greater burden. The court then decided *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248 (1981), clearly setting forth the burden to be imposed at the second stage, and further describing the analysis to be utilized in the third or pretext stage. The Court required that, after the defendant had articulated a legitimate non-discriminatory reason for the conduct, the presumption dropped from the case, and the burden of going forward shifted back to the plaintiff, where the burden of persuasion had remained. The Court indicated that the inquiry proceeded to a new level of specificity to determine either that the employer's reasons were not worthy of credence, or that more likely than not the employer was actually motivated by unlawful considerations.

Most recently, in *United States Postal Service Board of Governors v. Aikens*, — U. S. —, 103 S. Ct. 1478 (1983), the Court disapproved a wooden or mechanistic approach to the order and allocation of proof in treatment cases, and held that the plaintiff's pretext burden merged with the ultimate burden of persuading the Court that he had been the victim of intentional discrimination. The trial court was directed to consider the whole record, rather than singling out portions, to decide this issue. But the Supreme Court relied heavily upon the language of *Burdine* in deciding *Aikens*, and clearly did not intend *Aikens* to modify the burdens which earlier decisions had established. The case merely allows the trial court to draw *proper* inferences from the entire record in order to decide the ultimate issue.

The circuit courts have applied the foregoing cases in a variety of ways. This wide discrepancy led the Su-

preme Court to vacate and remand several cases, including the instant case, in light of *Burdine*. The Eighth Circuit has been unable to agree even with itself in the use of generalized evidence to show pretext. In fact, in three cases argued on the same day to the same panel, that Court reversed one court because it did not agree that generalized evidence was enough to contradict the specific articulation by the employer, *Danzl v. North St. Paul Maplewood-Oakdale Independent School District No. 622*, 706 F. 2d 813 (8th Cir. 1983); it affirmed another court because the plaintiff, through generalized evidence, had not borne her burden of establishing that the employer's reason was racially motivated, *Robinson v. Arkansas State Highway and Transportation Commission*, 698 F. 2d 957 (8th Cir. 1983); and it affirmed the trial court in *Vaughn*, finding pretext based almost solely on generalized evidence concerning the employer's workforce. These cases cannot be factually distinguished, nor can they be resolved legally.

The district court committed clear error in this case when it applied the generalized evidence concerning the employer's workforce conclusively to overcome the petitioner's specific rebuttal evidence. In so doing, the court gave the respondent the benefit of a presumption which should have dropped from the case, and imposed upon the petitioner the requirement to prove an absence of discriminatory motive, even though the respondent had never established the existence of the motive in the first place.

The court relied upon vague and generalized testimony which was unrelated to Ms. Vaughn's disqualification, and which come from an employee who was not working there at the time; generalized hiring, discharge, and placement evidence, without expert analysis; the conflicting reports by Vaughn's previous supervisor that she

was "satisfactory" but a "poor performer"; and the fact that the disqualifying supervisor had never communicated objective standards for production and had never stated that race was not a factor in his decision. Balanced against that evidence was the uncontradicted proof that respondent had had problems with production on the second shift; that these problems continued on the third shift; that she disliked the third shift and her job; that her supervisor had warned her five times, often in the presence of shop stewards, of her poor production, and that he took time to count specifically her number of errors in comparison to other workers; that in spite of this she did not improve; and that, of the three persons her supervisor had previously disqualified, only one, Vaughn, was black. By finding the plaintiff's evidence to preponderate, the trial court accorded conclusive weight to evidence which was unrelated to the employment decision at issue. This ignores the requirement of *Burdine* that the court's focus should reach a new level of specificity at the pretext stage, even though the issue was before the court on remand with express instructions to follow *Burdine*. Petitioner asserts that, in order to show pretext, the respondent's proof must be responsive to the petitioner's asserted reason for its conduct. Assigning a causal connection and probative force to unrelated statistical and anecdotal evidence on this issue effectively foreclosed the petitioner's opportunity to rebut the *prima facie* case, and ignored established case law.

If the court decides, correctly or incorrectly, that a plaintiff has established that racial motive may have played a part in the decision, the court is required to test that proposition, in the light of all of the evidence, to determine whether, for example, he acted any differently toward the plaintiff than he would have acted toward a sim-

ilarly situated person of the majority race. This or a similar test is implicit in the decisions of the court in *Burdine* and *Aikens*. It does not, however, require additional ordering of the proof, or the glossing of another presumption and rebuttal onto the *McDonnell-Burdine* formulation. It requires only the sort of analysis typically applied by trial courts to resolve issues of fact. The trial court here did not purport to do otherwise, but the effect of its analysis was to require the petitioner to rebut an unwarranted presumption by a preponderance of the evidence, and so is no different in result than *Perryman v. Johnson Products Company, Inc.*, 698 F. 2d 1138 (11th Cir. 1983). In any event, the petitioner here met even that excessive burden, and the court's decision to the contrary was inconsistent with previously enunciated legal standards and was clearly erroneous. This is demonstrated by the fact that the trial court found the same prima facie evidence unconvincing as to the other plaintiffs in *Vaughn*, even though the evidence was less remote as to their claims.

While *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) emphasizes the degree of deference a trial court's findings are afforded in such cases, the litigation history of *Vaughn*, combined with the conclusive force given to the generalized evidence, establishes that a "mistake has been committed", and this Court is authorized to correct that mistake even if it is unconvinced that the decisions in *Vaughn* suffer from any legal faults. Courts are generally less competent than employers at restructuring business practices, and this Court should not allow the kind of judicial interventiorism displayed in this case. The practical effect is ominous, both because it has substantial potential effects upon the day-to-day business practices of this country, and because it tends to encour-

age expensive, overly broad litigation to resolve individual disputes.

ARGUMENT

I. When in an individual disparate treatment case a generalized prima facie showing, consisting of general workforce statistics and anecdotal evidence, is rebutted by defendant's proof of a specific nondiscriminatory reason for the employment action, the plaintiff is required to present responsive and narrowly focused evidence concerning the particular conduct in issue in order to establish pretext.

A. The decisions of this Court establish guidelines for a gradual narrowing of the focus of proof to decide the ultimate issue of discrimination in individual cases.

Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, declares it unlawful for an employer to discriminate against any individual "because of such individual's race . . ." *Id.* Cases brought under the statute may allege that a facially neutral employment standard has a disparate impact upon minority employees or applicants, or they may allege that the plaintiff for a group of plaintiffs or class members were treated "less favorably than others because of their race . . ." *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 577 (1978). *See, e. g. International Brotherhood of Teamsters v. United States*, 431 U. S. 324, 335 N. 15 (1977). The latter theory is universally called a "disparate treatment" case. The development of the law under that theory has been relatively straightforward. In *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), this Court set forth the order and allocation of proof to be followed in treatment cases. Recognizing that an employer logically does not act without some motivation, and that it was logical to presume a discriminatory reason if no legitimate reason was offered, the Court established a relatively light

threshold burden by which a plaintiff could establish a *prima facie* case.[2] The plaintiff has only to show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and, (iv) that after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas v. Green,* 411 U.S. 792, 802 (1973). Once the plaintiff has established a *prima facie* case based upon this low threshold of proof, a judicially-imposed presumption arises "that the employer unlawfully discriminated against him." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981). The presumption is in the form of a legally-mandatory inference. *Id.* n. 10. Not unlike any other presumption arising under Rule 301, Federal Rules of Evidence, it is rebuttable. To rebut this presumption, "the defendant must clearly set forth, through the introduction of admissible evidence, the reason for the plaintiff's rejection." *Burdine, supra,* at 255. Put another way, the defendant must "produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Id.* at 254. Once the defendant has given a facially satisfactory reason, the presumption disappears, and the burden of going forward shifts back to the plaintiff, where the ultimate burden of persuasion always remains. *Burdine, supra,* at 256.

The inquiry does not end merely because the defendant can produce a facially legitimate reason for its conduct. Under the *McDonnell-Burdine* formula, the plain-

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[2]The Court implicitly recognized, too, that the employer had greater access to witnesses, evidence, and litigation resources than did the typical Title VII plaintiff.

tiff must then be given an adequate "opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *United States Postal Service Board of Governors v. Aikens,* — U. S. —, 103 S. Ct. 1478, 1481 n. 5 (1983), quoting *Burdine, supra,* at 256. This burden "merges with the ultimate burden of persuading the Court that [the plaintiff] has been the victim of intentional discrimination." *Burdine, supra,* 450 U. S. at 256.[3] "In short, the district court must decide which party's explanation of the employer's motivation it believes." *United States Postal Service Board of Governors v. Aikens,* — U. S. —, 103 S. Ct. 1478, 1482 (1983). On the nature and quantum of proof required at the pretext stage, *Burdine* holds that after a satisfactory explanation by the employer, the presumption "drops from the case," 450 U. S. at 255 n. 10, and "the factual inquiry proceeds *to a new level of specificity.*" 450 U. S. at 255. (Emphasis added).

Aikens holds that a trial court must not use the *McDonnell-Burdine* formula as a stilted mechanism by which to structure the presentations of the parties. Further, because of the very nature of "state of mind" or "intent" evidence, the plaintiff may offer either direct or circumstantial proof, or both, in order to show pretext. *Aikens, supra* at —, 103 S. Ct. 1482-83. It is recognized that the employer's pattern or practice of discrimination is admissible to show pretext, and the trial court should consider the entire record to decide the ultimate question "whether the defendant intentionally discriminated against the plaintiff." *Id.,* citing *Burdine, supra,* at 253. The proof, however, must be relevant to the

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[3] "The plaintiff retains the burden of persuasion. She may succeed in this either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U. S. at 256.

now-defined issue. The plaintiff, if he is to use circumstantial or generalized pattern-and-practice evidence, should be required to establish a causal connection between that evidence and the challenged conduct. It is the position of the petitioner that, for reasons of both practical and legal significance, such a showing of causation is required before a defendant may be held liable for inntentional discrimination. As the *Aikens* Court held, " . . . none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *Aikens, supra,* 103 S. Ct. 1482. Yet in the instant case, the trial court and the reviewing court did just that. It is clear from the record that these courts imposed an unfair and excessive burden upon the defendant from the outset, and that despite frequent changes in the semantics of the lower courts' opinions, that burden, in the form of an irrebuttable presumption, never properly disappeared from the case.

In the first opinion of the trial court in *Vaughn,* the petitioner was found to have failed to meet its burden of *persuasion.* The following language makes that clear:

> The Court is not persuaded that the defendant has borne its burden of proving that this disqualification was not motivated in substantial part by racial reasons. . . . Westinghouse, if it is to prevail, [must] show that the proof on its side is preponderant.
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> * * *
>
> Defendant's position is by no means without support, but it has simply failed to persuade this Court that its proof is sufficient to overcome plaintiff's *prima facie* case with respect to Ms. Vaughn's disqualification.

(JA 337-38, *citations omitted*).

The language imposing upon petitioner the burden of proving by a preponderance that race was not a factor

led petitioner to move for amended findings of fact and conclusions of law in reliance upon *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1978). The trial court responded by entering an order which essentially "tailored" the earlier erroneous language to the requirements of *Sweeney.* The Court stated that "[t]his Court's opinion of May 9, 1979, did not place upon defendant the burden of showing that its reason for disqualifying the plaintiff Vaughn was not pretextual. . . . Defendant simply failed to articulate a legitimate, non-discriminatory reason for Ms. Vaughn's disqualification." (JA 340). That hold was patently incorrect. Petitioner believed then and still believes that the trial court's erroneous view of the law when the original decision was made has colored the Court's judgment throughout and that defendant has never really been relieved of the originally imposed, improper burden of persuasion.

On the first appeal, the Court of Appeals, in a two-to-one majority opinion, affirmed, holding that the trial court was not clearly erroneous in finding that Westinghouse had failed to articulate a legitimate nondiscriminatory reason for Vaughn's disqualification. (JA 354-55). Upon Westinghouse's Petition for Certiorari, this Court vacated the cause and remanded for further consideration in light of *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). (JA 360-61). The Court of Appeals remanded to the District Court with the same instructions. (JA 362).

On remand, no new evidence was taken. The trial court determined that the plaintiff had been given ample opportunity to demonstrate pretext and asked the parties to review the evidence and brief the issues in light of *Burdine.* In its opinion on remand, the Court acknowledged that an erroneous burden had been imposed upon the de-

fendant in its earlier opinions. The trial court then concluded that Westinghouse *had* articulated a legitimate nondiscriminatory reason and turned its attention to the pretext issue. (Pet. App. B-3). The Court felt obliged to consider the whole record, judged "in the context of defendant's actions over a substantial period of time," (Pet. App. B-4), and in doing so found that Vaughn was disqualified *in part* because of her race, which was a violation of Title VII. (Pet. App. B-6). In an opinion filed March 11, 1983 the Court of Appeals again affirmed, Judge Fagg dissenting, holding that, although "it may well be that the panel, if sitting as the trial judge, might have found that Westinghouse's proffered reason for plaintiff's disqualification was not pretextual, the trial court was not clearly erroneous in holding otherwise." (Pet. App. A-4). In the opinion of both courts, the same generalized evidence which, interestingly enough, had been unconvincing with respect to all of the other discrimination claims in the case, was held to be sufficient to overcome the employer's direct and unchallenged proof of the legitimate basis for the employment decision to disqualify the respondent from her sealex machine operator's job for poor productivity.

By treating generalized, unrelated evidence as conclusive, the trial court in effect negated the requirement of this Court that intentional discrimination must be proven in a disparate treatment case. The court allowed respondent to prevail based upon vague and generalized references to black representation in the workforce which should not have been sufficient under *McDonnell Douglas* or *Teamsters, supra,* even to establish a *prima facie* case. Allowing such generalized evidence to prevail over the unassailable proof that the plaintiff performed poorly in comparison to her peers is clearly contrary to the established law, and undermines the burden of proof requirements in dis-

parate treatment cases. As was held in *Clark v. Huntsville City Board of Education*, 717 F. 2d 525, 529 (11th Cir 1983), "a court may not circumvent the intent requirement of the plaintiff's ultimate burden of persuasion by couching its conclusion in terms of pretext." That the court did so in this case is patently obvious.

B. Generalized evidence may not override a specific factual rebuttal of the prima facie case unless a causal connection is established by the plaintiff between the general discrimination and the particular conduct in issue.

In straightforward terms, the ultimate result reached by the Court of Appeals and the trial court in the instant case is this: Whenever an employer has less-than-perfect statistics concerning black representation in its workforce, the discipline of a black employee, however well-deserved, is accompanied by a presumption that the discipline must have been racially motivated. It matters not that the employee offers no evidence of discriminatory motive or any evidence at all, circumstantial or direct, relating to the challenged employment decision. Apparently, it does not matter that the employee would have suffered the same result even if she had been white!

In the circumstances described above, the court has not found that respondent has established a causal link between the unexplained hiring and promotion statistics and the totally different disqualification decision which is at issue. Rather, the court has simply ruled, in effect, that petitioner has failed to show that there was no causal link. That is not and never has been the law—not under Title VII, and not under any related legal theory pertaining to burden of proof. Such a rule imposes an improper presumption upon the defendant, as well as the burden to prove a negative, or the absence of a fact. Because

Title VII creates no such statutory presumption, to impose this burden judicially is clearly error, and has resulted in the instant miscarriage of justice.

The *Burdine* decision sets forth two ways to establish pretext. In the instant case, the trial court did not find that the employer's proffered explanation was "unworthy of credence." *Burdine, supra* at 256. In fact, the court did "not doubt that the burnt wires documented by defendant in fact existed, or that production problems were a genuine concern." (523 F. Supp. at 371; Pet. App. B-5).

Further, the court noted that after reading and rereading the disqualifying supervisor's testimony, "[t]here is no reason to disbelieve any of it." (Pet. App. B-6, n. 5). The court instead held, couching the holding in language similar to *Burdine's* other theory of pretext, that "on balance, the Court is persuaded that plaintiff's race was more likely than not one of the factors that contributed substantially to defendant's decision." (Pet. App. B-6, emphasis added). In short, even though "there was virtually no direct evidence of unlawful motivation on the part of Mr. Turnage," (Pet. App. B-4) and even though the defendant's documented reasons for its conduct were obvious and unrebutted, the court was somehow persuaded that unlawful reasons more likely motivated the employer. But, persuaded by what? Such a result applies the *Burdine* decision more as an afterthought than as a guideline for allocating the burdens in a Title VII case. It fails absolutely to recognize that a plaintiff must establish by a preponderence that the defendant intentionally discriminated against her. In light of the entire development of disparate treatment analysis, this casual easing of plaintiff's burden of persuasion effectively insures that the defendant rather than the plaintiff shoulders the ultimate

burden of persuasion once the *prima facie* presumption arises. This creates a lingering presumption that is antithetical to every decision of this Court on the subject since 1973.

In the seminal decision on disparate treatment, *McDonnell Douglas Corporation v. Green*, 411 U. S. 792 (1973), this Court discussed what evidence would be relevant at the third stage of proof, that coming after defendant has articulated a non-discriminatory reason for its actions:

> On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. . . . Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.

Id. at 804-05. It is significant that, of the factors listed, evidence concerning similarly situated white employees was considered "especially relevant," while, of the factors which "may be relevant," only the last one listed, dealing with generalized statistical evidence, was listed with a caveat. That caveat, found in footnote 19, reads in pertinent part as follows:

> The District Court may, for example, determine after reasonable discovery that "the [racial] composition of defendant's labor force is itself reflective of restrictive

> or exclusionary practices." . . . We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

Yet the courts below have found in the instant case that that generalized evidence similar to that which this Court countenanced against to be the artificial basis for finding pretext in Vaughn's disqualification.

In *Furnco Construction Corporation v. Waters,* 438 U. S. 567, 578 (1978), this Court held that, while not conclusive, generalized statistics of the employer's employment practices could be considered in determining his motivation in particular cases. There, of course, it was the employer's balanced statistics which were urged as conclusive by the petitioner.[4] But the reasoning applies equally to both parties—statistics good or bad, should not establish a conclusive presumption in favor of either party in a disparate treatment case. Like any other evidence, generalized statistical evidence may be rebutted.

Against this backdrop, the Supreme Court was presented with the *Burdine* case. *Texas Department of Community Affairs v. Burdine,* 450 U. S. 248 (1981). The clear holding of *Burdine* and prior cases is that the burden of persuasion never shifts; that, because of that, the defendant never has the burden of proving an absence of discrimination; that once a non-discriminatory reason is articulated, the presumption disappears, and the trial court

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[4]In fact, this Court has recently ruled that favorable "bottom-line" statistics, while they "might in some cases assist an employer in rebutting the inference that a particular action has been intentionally discriminatory", may not serve as a defense in a disparate impact case, once the impact upon individuals within a protected group has been established. *Connecticut v. Teal,* 457 U. S. 440 (1982).

must focus more closely on that evidence, in the *prima facie* case or elsewhere, related to the challenged decision —the more directly-related the better—to determine if the reason proffered is credible; and that, while the generalized statistics of the *prima facie* case are relevant to pretext, they should not be determinative in the face of more specific evidence on the ultimate fact question in issue. They cannot be used to shift the burden of persuasion by creating a situation in which it is impossible for a defendant to rebut the *prima facie* case with respect to a particular plaintiff's claim because his evidence does not "preponderate enough" to overcome the general statistics. In the first place, such a finding creates an "apples-to-oranges" evidentiary comparison. It also commits the same error as the First Circuit in *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1978), and the Fifth Circuit in *Burdine,* by glossing onto the employer's burden an additional requirement not intended or allowed by the established tests set out by this Court. In practical effect, no employer can defend even the most straightforward individual treatment case without also defending its practices across-the-board, regardless of whether those practices bear any relation to the challenged conduct.

C. The Circuit Courts, and particularly the Eighth Circuit, have created confusion among courts and practitioners in the application of the McDonnell-Burdine formulation.

The various circuit courts of appeals have variously applied *Burdine* and subsequent cases to the pretext stage of Title VII litigation. As has been shown, the Eighth Circuit, in the *Vaughn* case, has resolved the question of

discrimination *vel non* almost without discussion of *Burdine*. There is simply no consideration in *Vaughn* of the causal connection between the plaintiff's generalized *prima facie* case and the particular employment decision at issue. Instead, the appeals court somewhat reluctantly fell back on its often relied-upon appellate-review doctrine, merely expressing its reluctance to find that the district court's decision was clearly erroneous. (Pet. App. A-3, 4).

For some unexplained reason, the Eighth Circuit demonstrated a better understanding of the law in the earlier case of *Johnson v. Bunny Bread Company*, 646 F. 2d 1250, 1256 (8th Cir. 1981). In that case, the Circuit Court considered the appeal of two employees who unsuccessfully alleged discriminatory treatment as to working conditions and discharges. The Court, reflecting a proper distrust for marginally related evidence, "scrutinized closely" the generalized statistics offered to prove pretextual motive, and found that in light of the unrebutted evidence of legitimate reasons for the actions, the statistics were left "with little, if any, probative value." *Id.* at 1255. "Without additional evidence . . . the connection between [these statistics] and [Johnson's] discharge is too attenuated to compel a finding of [discriminatory] motive." *Id.* citing *Person v. J. S. Alberici Constr. Co.*, 640 F. 2d 916, 919 (8th Cir. 1981). The Court then searched the record for "additional evidence" that similarly situated white employees had been treated differently than blacks. Finding none, the Court held that the plaintiffs had failed to meet their third-stage burden.

In *Locke v. Kansas City Power and Light Co.*, 660 F. 2d 359 (8th Cir. 1981), the Court performed a proper analysis of the evidence similar to that employed in *Per-*

son, Johnson and *Middleton v. Remington Arms Company*, 594 F. 2d 1210 (8th Cir. 1979).[5] In properly finding pretext in *Locke*, the Court relied upon specific fact-findings related to the particular employment action in question and the credibility of defendant's articulated reason. There was no such analysis or similar evidence relied upon in *Vaughn*. The proper pattern that had appeared to emerge in the Eighth Circuit on the issue of pretext was simply not followed in *Vaughn*.

The best example of the confusion in this Circuit is illustrated by *Vaughn* and the two other Title VII cases argued to that same panel on the very same day, and decided within two months of each other. The *Vaughn* decision, of course, is before this Court, and its reasoning is set forth in Pet. App. A. The other cases argued along with *Vaughn* were *Robinson v. Arkansas State Highway and Transportation Commission*, 698 F. 2d 957 (8th Cir. 1983), and *Danzl v. North St. Paul Maplewood-Oakdale Independent School District No. 622*, 706 F. 2d 813 (8th Cir. 1983). In *Robinson*, the Court of Appeals relied upon *Burdine* and *Johnson, supra*, to find that the plaintiff had failed to establish pretext. In so doing, the Court considered carefully the facts surrounding the challenged employment decision. Although the plaintiff asserted strongly that her generalized evidence demonstrated pretext, it is notable that the Court dismissed this argument out-of-hand because she failed to "explain how such evi-

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[5]Before *Burdine in Middleton v. Remington Arms Co.*, 594 F. 2d 1210 (8th Cir. 1979), the Eighth Circuit considered it conclusive on the issue of pretext that the plaintiff was able to produce " 'not one scintilla of evidence' that *he* was treated any differently than other employees." *Id.* at 1213. Yet in *Vaughn*, both the trial and appeals courts candidly found that there was no such evidence presented by the plaintiff, but incredibly enough found the defendant guilty of unlawful discrimination nonetheless!

dence demonstrate[d] that her failure to be transferred was racially motivated. . . ." *Id.* at 958, citing *Johnson, supra,* at 1254-55. In other words, there was no causal link between that evidence and the challenged employment decision.

In *Danzl, supra,* the Court reversed the trial court's finding of pretext (on rehearing after remand in light of *Burdine*), relying heavily on the *McDonnell-Burdine* holdings that "[a]t all times the ultimate burden of persuasion that the defendant committed intentional discrimination remains with the plaintiff." *Id.* at 816. The key basis for the reversal in *Danzl* was the fact that the defendant's articulated reason for the difference in treatment was never contradicted, or, in effect, not shown to be a mask for unlawful discrimination. The same must be said of the defendant's reasons in *Vaughn,* but the result there was strikingly different. Importantly, the defendant in *Danzl* had a history of underrepresentation of women in administrative positions and had obligated itself under a national agreement between the United States Department of Health, Education and Welfare and the Women's Equity Action League to "make a conscious effort to select female administrators." *Id.* at 817. Despite generalized proof which favored the plaintiff, the Court nevertheless "thoroughly searched the record and . . . found nothing that supports the district court's finding of intentional discrimination." *Id.* at 818. The fact that it did not do likewise in *Vaughn* is the error which this Court must now rectify. If anything, the legitimate business reasons articulated for the challenged employment decision in *Vaughn* were much clearer and stronger than in *Robinson* and *Danzl.* There was not even diminishing, much less contradictory proof offered to rebut those reasons.

II. When the district court applied generalized evidence conclusively on the issue of pretext, a presumption of discriminatory animus and the corresponding burden to prove the lack thereof was imposed upon the petitioner effectively foreclosing the opportunity to rebut the inference drawn from the prima facie case.

In the case of Ms. Vaughn's disqualification, it is obvious that the trial court found certain "statistics"[6] and general testimony to be controlling, even in the face of unrebutted, individualized and specific testimony and exhibits establishing, as the trial court itself admitted, "that plaintiff's job performance did leave something to be desired." (Opinion on Remand, Pet. App. B-5). Thus, even though the court did not doubt "that the burnt wires documented by defendant in fact existed, or that production problems were a genuine concern", and with no evidence that the particular supervisor was motivated by anything other than those legitimate concerns, the Court held a second time that Ms. Vaughn "was disqualified in part because of her race." (Pet. App. B-5, 6).

A. The evidence relied upon by the trial court to establish the pretext was not probative of the alleged discrimination.

The error in this conclusion is best illustrated by a careful review of the record evidence relied upon by the District Court. In its original opinion (JA 326-329) the court catalogued in detail the proof held to support a *prima facie* case. The evidence relied upon was as follows: There had apparently been pre-Act discrimination against blacks, since virtually none had been hired before 1965. Only 3 of 22 office and clerical employees were black.

[6]The word is placed in quotes because, as will be discussed *infra*, no true statistics and no numerical analysis were produced at trial.

Only 2 of 25 or 26 supervisors were black, and supervisory vacancies were not publicized. While blacks were hired roughly in proportion to their representation in the relevant population, the black representation in the workforce appeared to be artificially depressed. Black employees were concentrated in production jobs, which were lower-paying. Of the 31 management positions, only 2 were held by blacks. The criteria utilized for selection from among applicants appeared to be subjective. Finally, Ms. Wilma Donley, a Westinghouse employee from August 31, 1972 until August 28, 1978, gave "wide-ranging" testimony that she had observed harassment of black employees by supervisors, that blacks had far more grievances than whites concerning treatment at the plant, and that blacks were disparately assigned a greater share of work while white employees loafed in the bathroom. (JA 326-329).

In the Opinion on Remand (Pet. App. B-5), the trial court added the following evidence to the list:

> "that almost all of defendant's supervisors, including the two men under whom plaintiff worked as a sealex operator, are and have been white; that most of the labor-grade-four sealex operators in 1971, where plaintiff was disqualified, were white (T. 15); that '(b)asically all' the labor-grade-one bulk loaders (the lowest paying job to which plaintiff was demoted) were black (T. 17); that plaintiff, according to a memorandum dated January 18, 1971, performed satisfactorily on the sealex machine while working under O. D. Brazil, before her transfer to Mr. Turnage's shift; and that plaintiff had progressively been given pay increases, until several months before her disqualification, she had reached the top rate of pay available for that work."

Taking each of these findings in turn, the startling lack of relevance and probative force of this evidence be-

comes obvious. The findings relating to statistics are drawn from the testimony of Mr. Hunnicut, the plant personnel manager (taken as a Fed. R. Evid. 611(c) adverse witness) (Tr. 238-336), and from Plaintiff's Exhibits 1, 2, 3 and 5 (copies of Defendant's Answers to Interrogatories dealing with applicants/hiring, managers, supervisors, and discharges) (Tr. 275, 290, 309 and 320, respectively). There was no expert analysis of any of the statistics contained in these exhibits. In fact, they were admitted over the objection of the petitioner as to relevance and because respondent had not identified them as exhibits prior to trial as required by local federal practice rules. (*See,* Tr. 282-286, 275, 290, 309 and 320). The trial court admitted them into evidence for the purpose of evaluating the petitioner's motivation, recognizing that there was no longer any class-wide issue and that no plaintiff had a hiring claim or a claim of failure to promote to supervisor.

It has previously been noted that *McDonnell Douglas Corp. v. Green,* 411 U. S. 792, 805 n. 19 (1973) cautioned against the injudicious use of generalized statistics in individual treatment cases. A similar *caveat* is found in *International Brotherhood of Teamsters v. United States,* 431 U. S. 324, 339, and n. 20, 340 (1977), wherein the Court explained that statistics, while useful, "come in infinite variety and, like any other kind of evidence, may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. *See, e.g., Hester v. Southern R. Co.,* 497 F. 2d 1374, 1379-1381 (5th Cir. 1974)." The *Hester* Court found erroneous as a matter of law a finding of discrimination based upon "extravagant extrapolations" and abstract propositions, drawn from inconclusive testimony concerning the number of black applicants, rather than upon proof of discrimination. Statistics should be

viewed cautiously even when carefully analyzed and explained by experts. When introduced haphazardly and without any explanation, at a time when, because of surprise and the individual nature of the case, the defendant has no real opportunity to prepare an analytical rebuttal, they should be scrutinized even more closely and discounted accordingly if they do not relate to the issue, they should not be considered at all.

In *Pegues v. Mississippi State Employment Service,* 699 F. 2d 760, 766-67 (5th Cir. 1983) (— U. S. — *appeal pending*), the Court held that, while generalized raw data, unanalyzed, may help to establish a weak *prima facie* case, no reasoned assessment or valid conclusion can be drawn therefrom. *Id.* Further, the court held that, if the plaintiff succeeds in establishing a *prima facie* case on this basis, the defendant has two methods available for rebuttal. He can choose to attack the statistics, either by discrediting the plaintiff's proof or by his own presentation, or he can advance "a nondiscriminatory rationale for what appeared to be discriminatory conduct." *Id.* at 766. This latter method is precisely what was foreclosed by the trial court in *Vaughn.* By requiring defendant to disprove any causal connection between the statistics and the disqualification of *Vaughn,* the trial court created a "revolving door", through which the respondent's generalized evidence kept appearing, overcoming all of the facts which could ever have been produced by the petitioner in support of the decision by Mr. Turnage, Vaughn's supervisor. In effect, petitioner never overcame the *prima facie* case because the court had drawn an impermissible inference and then allowed it to preponderate over the specifically focused evidence of the petitioner.

The Court of Appeals for the Fourth Circuit, in *E.E. O.C. v. Federal Reserve Bank of Richmond,* 698 F. 2d 633,

645-47 (4th Cir. 1983) (— U. S. — *appeal pending*), expressed a similar trepidation in its approach to the use of statistics. There the Court disapproved an expert analysis because the test that was applied was of limited value. The Court noted that rebuttal of statistics may take a number of forms, concluding that "in no case should there be a blind adherence to the proposition that mere statistical imbalance equals discrimination." *Id.* at 646. Quoting *Teamsters, supra,* the Court held that such evidence may be rebutted by "demonstrating that [the plaintiff's] proof is either inaccurate or insignificant." *Id.* Petitioner here earnestly submits that the primary if not the only way to establish that generalized statistics are insignificant in an individual treatment case is to present the reasons for the challenged conduct. Once that is done, the inference arising from the statistics, as from the *prima facie* case in general, drops from the case, and the plaintiff must come forward with some evidence (if it intends to rely primarily on generalized evidence) which establishes a causal connection between the generalized proof and the challenged conduct.

The trial court in *Vaughn* next discussed the allegedly subjective criteria used in hiring and the disparity of hiring rates between black and white applicants. (JA 327). It is true that petitioner did not seek to explain these statistics. It was at the time no longer faced with any class issues, but only faced with the individual treatment cases of three employees, none of whom had a hiring claim. Moreover, the plaintiff Vaughn had been hired as a labor-grade-four sealex machine operator, well-above entry-level, and so had, therefore, apparently suffered neither hiring discrimination nor discrimination in her initial assignment. (DX 35v, JA 292). Petitioner

could logically assume, especially since the respondent had no expert witness and had totally failed to identify any exhibits, statistical or otherwise, prior to trial, that it could avoid the exhorbitant expense of a statistical rebuttal such as would be required in a class action suit. These unrelated statistics were simply not probative on the issue of Vaughn's disqualification for excessive wasted product. There was no proof that Vaughn's plant foremen had anything to do with the hiring process. There was not any proof that he had consulted with persons who did the hiring before he disqualified Vaughn. There is no factual basis for concluding that he was motivated by anything other than her poor performance, nothwithstanding the company's hiring statistics.

If every individual case must be tried as though it were a class action, even though there is direct factual rebuttal evidence on the particularized conduct, the federal courts will quickly become bogged down in a quagmire of marginally-relevant statistical proofs which serve only to increase the expense and time required to decide such cases, while providing little to aid the trier-of-fact in those decisions. Court decisions like the one in *Vaughn,* which turn their backs on the individual facts of the employment decision in question, overemphasize the non-related statistics and produce this judicial backlog.

The next element of the *prima facie* case in *Vaughn* was the testimony of Wilma Donley. (JA 328). Ms. Donley's testimony is found at JA 56-126, and was included in the Appendix at the request of the respondent. Although this evidence seemed important to the trial court, petitioner is at a complete loss to explain its relevance to Vaughn's disqualification. First, Ms. Donley was not even employed at Westinghouse until August 31, 1972 (DX 63, JA 153), *more than one year after Vaughn had*

been disqualified as a sealex machine operator on April 19, 1971. (DX 41, JA 312). Ms. Donley had absolutely nothing derogatory to say about Mr. Turnage, Vaughn's disqualifying supervisor, even though she had worked under him. (JA 91). Instead, she named two supervisors she thought had mistreated employees, Mr. Birch (JA 58-60) and Mr. Maynard (JA 66), but in neither case did she even say that their treatment was racially motivated. She did not identify a single supervisor who had ever used racially derogatory remarks, including Mr. Skelly, her principal supervisor with whom she had almost daily contact. She complained that employees were put on jobs without sufficient training (JA 68), but she did not state that blacks were treated differently than whites in this respect. She claimed that black employees were required to do utility work while the utility girls, most of whom were white, lounged in the bathroom. (JA 74). She only knew this because she was in the bathroom with them. She did not indicate whether any Westinghouse supervisor even knew of this rather common plant problem. She gave not a single instance where any of petitioner's employees directly or openly mistreated blacks, or used racial slurs, or otherwise created overtly discriminatory conditions. The court credited her testimony that she served as some sort of "ombudsman" for black employees (at the request of the union president, who was concerned that black employees saw him as prejudiced) (JA 96), but she had filed only one grievance during her tenure as a shop steward. (JA 90). She had never filed a grievance for a white employee. (*Id.*) Most of her activities in this respect were informal and unofficial, and there was no evidence that the petitioner knew of them. Most of these activities, including her taking some thirteen unidentified (JA 83, 117) black employees

to a lawyer to initiate an action for discrimination, were accomplished while she was off work on maternity leave. She could not remember names or dates regarding virtually all of her testimony. (*See e. g.* JA 124). And even as to the one case as to which she was specific, she testified that Mr. Harris, the black employee, was asked to do a common task required of all employees (JA 93), and that the supervisor was under a lot of job-related pressure because of machine breakdowns at the time of the incident. (JA 94). In short, her testimony is virtually valueless and cannot be considered probative even of a racially-discriminatory environment, much less as specific support for Vaughn's totally unrelated *prima facie* case. Her entire testimony should be read, too, with the understanding that during her six years of employment, she had never been disqualified or disciplined for job performance and was terminated only after it became obvious that she could not perform the job because of undisputed bad attendance. She had missed more than thirteen months of work during her six years of employment. (DX 63). As was held in *Hester v. Southern R. Co.*, 497 F. 2d 1374, 1380 (5th Cir. 1974), "[t]he value of [her] testimony is seriously undermined by its subjectiveness and lack of precision."

The trial court's Opinion on Remand reiterated some factors and suggested others which, in the court's opinion, overcame petitioner's rebuttal and established pretext (Pet. App. B-5):

> "Almost all defendant's supervisors . . . are or have been white."

This evidence is directly probative only as to discrimination in promotion to supervisor, an allegation not in issue here. It may also create a perception of discrimination among minority employees, and may warrant

closer scrutiny of supervisory decisions by the trier-of-fact. Certainly the court may not infer, however, that because a supervisor is white, he or she must necessarily discriminate against blacks. Particularly the court may not infer such animus on the part of the supervisor in question, Mr. Turnage. The testimony of Donley and of the plaintiffs below did identify some supervisors whom they thought were discriminatory. To Mr. Turnage's credit, however, not a single witness gave an instance where he had ever mistreated a black employee or had even appeared to be prejudiced. In fact, Ms. Vaughn herself did not complain about Turnage, and did not believe he had discriminated against her. Vaughn's own testimony makes this clear.[7]

The Court's Opinion on Remand continues:

> "that most of the labor-grade-four sealex operators in 1971, when plaintiff was disqualified, were white (T. 15)".

(Pet. App. B-5). The court directs our attention to the testimony of Ms. Vaughn in support of that proposition. Her testimony, in the form of an obscure and hesitant estimate, without accompanying numbers or identification of persons, shifts, or areas of the plant. is valueless. It is also quite similar to that disapproved in *Hester, supra* at 1380. When asked the number of blacks or whites working sealex on her shift, she stated, "I

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[7] Q. "So, only as to you, you feel like Westinghouse—[discriminated] against you by Mr. Brazil's treatment?" A. "Yes, and that is—to that question, yes." THE COURT: "Maybe I misunderstood the testimony, but it was Mr. Turnage who told you you were disqualified?" THE WITNESS: "Yes." THE COURT: "Is it your contention that he did that because of race?" THE WITNESS: "No, Mr. Turnage told me I was disqualified as to a notice from the front office. I do not feel that Mr. Turnage himself disqualified me. . . ." * * * THE COURT: "So your main complaint, at least relates to Mr. Brazil?" THE WITNESS: "Yes." (JA 51, 52).

can't—they possibly—it was more whites than blacks. We had very few black sealex operators then." (JA 35). Without some form of analysis or corroborating numbers, a court should be very hesitant before drawing finite conclusions from such flimsy evidence. And it is a plaintiff's, not a defendant's, burden to produce such evidence and analysis. *Pegues v. Mississippi State Employment Service,* 699 F. 2d 760, 768 (5th Cir. 1983).

> "that 'basically all' the labor-grade-one bulb loaders . . . were black (T. 17);"

(Pet. App. B-5). Again, the trial court cites only the testimony of Vaughn in support of that finding. There is again no number given, no shift identified, and no hint by the witness that she found this to be discriminatory. (JA 36). When asked about specific instances of discrimination, she was even less definitive. (JA 38). To think that such evidence as this could preponderate on the narrowly focused issue of her disqualification is beyond belief. It could not and would not unless the burden to preponderate has been improperly placed upon the defending party.

Further, even assuming that such testimony might have value in some cases to support a plaintiff's pretext case, it has none here. It is clear from the court's own findings, the testimony of the plaintiffs, and the exhaustive testimony of Mr. Hunnicutt, the plant manager (JA 127-217) (Tr. 437-539), that the jobs referred to by the court are filled according to seniority on a job-bid system. Since the system itself was not challenged as discriminatory or as not *bona fide,* no more specific evidence was adduced on the point. But it is clear that supervisors, because of the seniority system, have almost no authority over promotions, excluding past disciplinary or documented production problems. Drawing a conclusion

that one of those supervisors used race as a factor in disqualifying the respondent, based upon such generalized and vague proof regarding hiring and assignments is simply more "extravagant extrapolation". *Hester, supra* at 1381.

> "that plaintiff, according to a memorandum dated January 18, 1971, performed satisfactorily on the sealex machine while working under O. D. Brazil, before her transfer to Mr. Turnage's shift."

(Pet. App. B-5). This evidence comes closest to going to the issue of pretext. Absent any explanation, it might appear that the petitioner had described respondent's performance as satisfactory and then unsatisfactory within the span of a few months. But the evidence did not appear without explanation. First, Vaughn herself testified that she had had problems on the sealex and had been counseled by both Mr. Maynard (JA 26) and Mr. Brazil (JA 51-52, 48). The petitioner produced accepted evidence that the January 18 memorandum was inadvertently erroneously recorded, and produced a contemporaneous form (DX 36) (JA 293-4) written by Supervisor Brazil in January of 1971, that indicated he would not rehire her as a sealex operator because she "cannot get production" and her quality and quantity of work were "poor". Her weakest point was described as "absenteeism and late too often." (JA 294). Further even if that rebuttal evidence was not believed, it could at best only indicate, and so the court found, that she was not so *un*satisfactory on Brazil's shift as to warrant disqualification. It says nothing about her performance on Turnage's shift, a late-night shift and job which she expressly disliked and in which she performed poorly. (DX 37, JA 302). Once, in fact, in the presence of a shop steward, Vaughn appeared to fall asleep while being reprimanded

by Turnage for poor performance shortly before her disqualification. (DX 39, JA 309).

> "and that plaintiff had progressively been given pay raises, until several months before her disqualification, she had reached the top rate of pay available for that work."

(Pet. App. B-5). That evidence, too, might support a finding of pretext, if viewed in a vacuum and if, from that showing, one could infer meritorious performance or that the testimony of Brazil and Turnage was *not* credible. But, as before, there was other evidence on the point. Defendant's Exhibit 2, Exhibit A (JA 268), establishes that an operator in Labor-Grade-Four reaches the top rate of pay in fourteen weeks from the date employed, provided he maintains a minimum level of production. The raises are based on minimum or satisfactory performance, not merit. Vaughn received all of her rate increases under Mr. Maynard, *before* transferring to Mr. Brazil's shift (DX 35q-v, JA 287-292). She did not receive a pay raise from either Brazil or Turnage. Further, all of her pay increases were on the earlier second shift, which she admittedly preferred. That evidence then, is simply not probative of pretext because it does not contradict the testimony of either supervisor.

As a final factor, the trial court noted that Turnage had not testified that Ms. Vaughn's race was not a factor in his decision. (Pet. App. B-6 n. 5). The court viewed this as unusual, and apparently found it to be a prerequisite to a finding for petitioner. Petitioner knows of no cases by this Court which require self-serving affirmations. In fact, *Teamsters* discourages their use.

B. Petitioner's rebuttal evidence went directly to the conduct in issue, and established factually that discrimination was not a factor in the challenged decision.

In rebuttal, the petitioner presented in addition to the evidence outlined above, the following:

Mr. Clint Turnage, the disqualifying supervisor, testified that he had been a supervisor for about four years. (JA 218), and before that had been Vice-President of the employees' union and a production employee. (JA 219). At the time of his testimony, he was President of the union, elected by his fellow employees. (JA 219). Yet, the trial court attributes to him a racially-biased attitude and finds him guilty of intentional discrimination against at least one member of that union.[8] He testified concerning his notes made concurrently with warnings given to Vaughn on five separate occasions. (DX 37, 38, 39 and 40, JA 296-311). He explained that Vaughn had expressed a dislike for her job. (JA 223); that she had missed a number of sealing heads and exhaust ports and was getting too many burned light bulb filament wires (JA 224); that he had monitored her work closely, and monitored the production and error rates for other operators and other shifts, and informed her specifically of those numbers (JA 225, DX 39, 38, and particularly 37, JA 299); that she had appeared to fall asleep while he was counseling her about her performance (DX 39, JA 309); that, in all but one of the counseling sessions, a shop steward had been present; and that, after all of those warnings, there was no sustained improvement in her performance. (JA 226). Much of the trial court's reluctance to give this testimony a preponderant weight came from the court's notion that the evaluations of her performance were subjective. This conclusion was drawn from the finding that the petitioner had not "set a

[8]It should be noted that, as President of the union, he presumably was a participant in agreeing with the respondent to sign a consent order dismissing the union from this lawsuit. (See style of complaint at JA 5).

numerical standard of production, communicated it to employees, and enforced it uniformly." (Pet. App. B-6). That finding comes one sentence before the court found that "Turnage *did not act objectively* in the sense of counting and documenting the number of plaintiff's burnt wires, but he never communicated to her any fixed number that she could not exceed, nor did he testify as to what the number might have been." (Pet. App. B-6) (emphasis added). In the first decision, the trial court noted that Vaughn "unquestionably had problems with production, but the absence of objective production criteria makes it difficult for the court to hold that these problems were serious enough to meet the burden imposed upon the defendant by law." (JA 338). It is clear that the court placed heavy emphasis on the lack of positive objective criteria, in fact so much so that it found the *negative* production figures—the number of burned wires—to be unacceptable as a standard at all. (*See e.g.* Pet. App. B-6, n. 4). Petitioner maintains that the trial court has entered an area of unbridled judicial interventionism when it chooses the "better" of available objective standards and imposes liability solely because the defendant chooses another alternative, which is just as measurable and specific. This is the worst form of hindsight, made worse by the fact that the court is in reality simply looking over the shoulder of a first echelon supervisor and attempting to impose a substitute standard for the perfectly lawful one chosen by that supervisor. Yet, when fashioning a remedy, the very court which was so quick to declare the standard to be discriminatory and subjective declined to impose objective standards upon the petitioner.[9] Was not the trial court itself practicing a

[9]The court felt it had

"neither the inclination nor the talent to involve itself in management decisions of this nature. Such objective

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double-standard in taking this obviously contradictory approach? It is manifestly unfair to impose liability based upon criteria which the court itself finds to be impractical to apply, and "[un]necessary to vindicate the statute." (JA 342). There is no evidence to discredit petitioner's explanation of Vaughn's disqualification. It was Turnage who made the decision. Now, in retrospect, he is told by the trial court that he based his decision "in substantial part" on her race, even though there is absolutely nothing in the record regarding this or any other decision he has ever made which supports that finding. Moreover, there was no evidence that anyone other than Mr. Turnage had anything whatsoever to do with his decision to disqualify her.

With respect to his other decisions, even though it is plaintiff's burden to produce the "especially relevant" litmus comparison of similarly situated employees, the respondent produced no evidence that white employees with problems similar to Vaughn were ever treated differently, or that Turnage himself had favored some employees over others, white or black. Petitioner on the other hand, as a part of its rebuttal produced the evidence that, of the three employees that Turnage had disqualified or failed to qualify as a supervisor, two were white and only one, Vaughn, was black. (JA 230-232).

Petitioner also produced evidence, through Mr. Brazil's testimony, that Vaughn tended to have to be prodded to perform any peripheral duties (JA 242-3); that as a sealex operator she couldn't keep light bulb heads full on

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statistical criteria for job performance, though they no doubt could be devised, would inevitably present difficult questions of application to individual cases, unless they are to be mechanically applied in every instance, without regard to the circumstances of individual employees." (JA 341-42).

the sealex, resulting in poor production (JA 244); that when warned about her poor performance, she did not improve (JA 245); that she had a "continuing problem" with attendance and coming in late (JA 245); and that she had been issued written warnings and other discipline in subsequent positions under his supervision (JA 246-47, DX 46a and b), and her problems again did not improve (JA 248). After hearing that evidence, however, the trial court chose to give weight only to the personnel form which indicated that she had had "previous satisfactory experience." Worse, the court found that kind of evidence to preponderate, even though convinced that Vaughn's production problems were real. (Pet. App. B-5). Simply put, the court imposed upon petitioner the court's own brand of business judgment that Vaughn's poor performance did not warrant disqualification. Said the court, "[i]f the issue were narrowly confined to evidence bearing directly on the decision to disqualify the plaintiff, there is no question that defendant would prevail." (Pet. App. B-4). But under this Court's pretext guidelines the question was so confined. *Burdine* requires that, at the pretext stage, the proof must be more narrowly focused, more resolutely aimed, than in the *prima facie* case. This is because the sole purpose of the pretext stage is to give the plaintiff an opportunity to show that the reasons proffered by the defendant are a sham, a mere facade hiding the true discriminatory motives of the decision-maker. If the issue is not "narrowly confined" to that determination, there is no need for the pretext stage at all. Instead, as happened here, the court is free to draw any conclusion it chooses from the *prima facie* case, no matter how remote or generalized that evidence may be in relation to the conduct in question.

C. The trial court disregarded Petitioner's explanation, and did not require Respondent to meet her burden of persuasion on the issue of pretext.

It is true that even though a defendant articulates a legitimate reason, the court is free to hold that the articulation was pretextual and can consider the *prima facie* evidence on that issue. *Burdine, supra* at 255, n. 10. It is not true, however, that once a defendant has rebutted the *prima facie* case with respect to a particular plaintiff or claim, the court is free to disregard the rebuttal simply because the court remains somehow unconvinced that the employer's reasons were lawful. It is rather the plaintiff's burden to establish that the reasons were *un*lawful. Were it otherwise, the requirement of *Board of Trustees of Keene State College v. Sweeney,* 439 U. S. 24 (1978), that a defendant need not prove the absence of unlawful motivation, would be relegated to mere semantics. No defendant would be able to defend a treatment case unless every conceivable factor, however remote and speculative, which might have affected the employment decision had been rebutted.

In the context of the *Vaughn* case, the trial court, in essence, required the petitioner to prove that the original but highly attenuated motive presumed from the *prima facie* case was not a factor in the employment decision. The court's finding that race was more likely than not a factor in the decision was simply another way of saying that, while petitioner proved that it had a valid reason for its actions, it failed to prove that there was not an invalid reason also operating. This imposed a burden which *Sweeney* and *Burdine* hold should not be imposed. As Judge Fagg said in his dissent in the second appellate decision, in words more succinct and telling than any the petitioner could offer:

"I disagree that the evidence in the record demonstrates that Vaughn met her burden of proving by a preponderance of the evidence that Westinghouse's reason was a pretext for discrimination. See *Texas Department of Community Affairs v. Burdine, supra,* 450 U. S. at 252-53.

* * *

The focus of this case is on the graveyard shift and the evidence is one-sided in favor of Westinghouse. . . . Based upon the record, I feel we are obliged to find that Vaughn disliked the late shift, she was underachieving on the sealex machine, and she was not motivated to improve upon an unsatisfactory performance notwithstanding the wasteful and costly consequences to her company.

In my view Vaughn failed to meet her burden of persuasion that a discriminatory reason was the basis for her disqualification and transfer to a lower paying job and the district court's ruling to the contrary is clearly erroneous." (Pet. App. A-4-A-6) (Fagg, Circuit Judge, dissenting).

III. Even if a court concludes incorrectly that there was discrimination generally affecting the particular employment decision, if the defendant has destroyed the causal connection by showing as a part of its rebuttal that the decision would have occurred even absent the discrimination, there is no liability under Title VII.

Petitioner does not believe that a racial motive was established by respondent with respect to Turnage's disqualification of Vaughn. Petitioner strongly urges that evidence of the nature relied upon by the trial court and affirmed by the Court of Appeals, should never be used as a basis for a finding of intentional conduct in the face of a rebuttal which has not been shown to be false, and which the court itself believed. (Pet. App. B-5, n. 5). But *Burdine, Aikens,* and other cases from this court suggest that such evidence, "and inferences *properly* drawn therefrom

may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual." *Burdine, supra,* at 255, n. 10. (emphasis added). The point has already been argued that, in effect, the inference drawn by the trial court here was not proper, inferring more than could be inferred from evidence not probative on the issue before the court. Another question, however, is raised at the pretext stage, either when a proper inference can be drawn or when, as here, it has been incorrectly drawn. The issue is whether, given that race may have been a factor in the employer's decision, what additional inquiry, if any, must a court make to resolve the ultimate fact issue of whether the plaintiff has suffered from intentional discrimination?

A. This Court has not addressed a "dual motive" case under Title VII.

The Supreme Court has never squarely addressed the "mixed" or "dual motive" question in a Title VII disparate treatment case. The question has been addressed quite recently, however, in a case involving a claim of unlawful discharge for union activities, in violation of §§ 8 and 10 of the National Labor Relations Act.[10] *National Labor Relations Board v. Transportation Management Corp.*, — U. S. —, 103 S. Ct. 2469 (1983). There the Court held that

> "If the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons he offers are pretextual, the employer commits an unfair labor practice. He does not violate the NLRA, however, if any anti-union animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause."

Id. at —, 103 S. Ct. 2472.

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[10] 29 U. S. C. §§ 158, 160.

The narrow question before the Court was whether it was proper for the National Labor Relations Board to consider the employer's assertion, that the anti-union animus made no difference in the result, as an affirmative defense, and in so doing impose a burden of persuasion upon the employer to establish that fact by a preponderance of the evidence. Put another way, could the Board impose upon the defendant a burden similar to that imposed by courts in cases arising under the First Amendment to the Constitution of the United States? *Mount Healthy City School District Board of Education v. Doyle*, 429 U. S. 274 (1977).[11]

An essential prerequisite to imposition of the *Mount Healthy-Wright Line*[12] burden upon a defendant is that a plaintiff (the General Counsel) first establish by a preponderance of the evidence that anti-union animus was a factor in and contributed to the employer's decision to discharge an employee. 103 S. Ct. 2471. Then, even if the employer "failed to meet or neutralize the General Counsel's showing, [it] could avoid the finding that it violated the statute by demonstrating by a preponderance of the evidence that the worker would have been fired even if he had not been involved with the Union." *Id.*

In so holding, this Court expressly distinguished the third-stage or pretext burden in Title VII cases after

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[11]The *Mount Healthy* test answers the question of whether "but for" the unlawful discrimination, the conduct would not have occurred, by placing a burden "on the defendant to show by a preponderance of the evidence that he would have reached the same decision even if, hypothetically, he had not been motivated by a desire to punish plaintiff for exercising his First Amendment rights." *National Labor Relations Board v. Transportation Management Corp., supra,* at —, 103 S. Ct. 2475.

[12]*National Labor Relations Board v. Wright Line,* 662 F. 2d 899 (1st Cir. 1981) (*cert. denied* 455 U. S. 989).

Burdine, finding that reasoning "inapposite" in a dual motive case. *Transportation Management, supra,* at —, 103 S. Ct. 2473 n. 5. Thus it is clear that the burden of persuasion does not shift in a Title VII case, at least until pretext or racial animus is established as one of the factors influencing the employer's decision. Imposing a burden of persuasion on the defendant before the plaintiff's proof has clearly established this animus is error.

B. The Circuit Courts which have addressed the issue have resolved it differently.

The Court of Appeals for the District of Columbia Circuit addressed this question in *Toney v. Block,* 705 F. 2d 1364 (D. C. Cir. 1983). There, in a case involving a federal employee who had exhausted formal administrative procedures, the plaintiff sought to impose upon the employer the burden to establish by clear and convincing evidence that an unlawful factor was not the determinative one. The Court agreed that this burden would be appropriate in the circumstance where "the plaintiff had established [before an administrative tribunal] that unlawful discrimination had been applied against him *in the particular employment decision for which retroactive relief was sought.*" *Id.* at 1366. (emphasis the Court's). It was not fair, however, to impose that burden upon an employer when discrimination at large, but not in the specific conduct, had been shown. *Id.* at 1366, 67. The Court relied upon the language in *Burdine, supra,* to hold that demonstration of discrimination at large constitutes, for purposes of individual relief, no more than the *prima facie* case that shifts the burden to the defendant to give a justification. Once the defendant produces a reason, the plaintiff may use the

generalized proof to prove pretext, but it is plaintiff's ultimate burden to prove it, not defendant's burden to prove the opposite. *Id.* at 1367-68.[13] The Court's discussion of the use of generalized evidence of discrimination at-large to establish a *prima facie* case disapproved the imposition of any burden upon the defendant which shifted the burden of persuasion. *Toney, supra.* Thus the Court declined to impose a "fourth-stage" burden in individual disparate treatment cases.

The Court of Appeals for the Eleventh Circuit has addressed this same question, but resolved it differently. In *Perryman v. Johnson Products Company, Inc.*, 698 F. 2d 1138 (11th Cir. 1983), the Court carefully set forth its view of the allocation of burdens after *Burdine.* In its view, the plaintiff may attack defendant's articulated reasons under either of the theories described in *Burdine,* and, if successful, create a new presumption of discriminatory intent that may only be rebutted by a showing by the employer that the adverse action would have been taken even in the absence of discriminatory intent. *Id.* at 1142.

C. Petitioner produced evidence concerning similarly situated white employees and resolved the "dual motive" question by establishing that race was not a factor in the decision.

Petitioner raises these points to urge that this Court avoid adding additional formal stages and tests to the individual disparate treatment case. If individual courts choose to view the evidence in one way or another in order to resolve the ultimate issue described in *United States Postal Service Board of Governors v. Aikens,* — U. S. —,

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[13]The *Toney Court* viewed the *Day v. Williams,* 530 F. 2d 1083 (D. C. Cir. 1976) (per curiam), formula as going to the issue of remedy, not liability. *See, e. g., Milton v. Weinberger,* 696 F. 2d 94, 98 (D. C. Cir. 1982).

103 S. Ct. 1478 (1983), that is their prerogative, as long as they remain true to this Court's pronouncements. *McDonnell Douglas v. Green*, 411 U. S. 792 (1973), accomplished enough in this regard when it instructed courts as to what evidence was especially relevant, and what was less relevant or probative, on the issue of pretext in an individual case. Considering the evidence according to its degree of relevance or probativeness, in the more narrowly focused manner required by *Burdine*, would accomplish the same result as a formalized shifting of the burden of persuasion. But, even if this Court chooses to require another stage of proof, it must nevertheless reverse the decision in the instant case. The petitioner, choosing not to take the expensive and wasteful path of rebutting marginal inferences from generalized proof, aimed its defense directly at the employment decision in issue. It introduced evidence, considered especially relevant in *McDonnell Douglas*, of how similarly situated employees had fared in similar circumstances.[14] It gave legitimate, objective business reasons for its conduct.

A final point needs to be made concerning the force and effect of the *prima facie* evidence. The trial court relied upon the very same generalized evidence to establish the *prima facie* case for all three plaintiffs in its original opinion. (JA 324-330). Yet the Court did not deem such evidence to be sufficient to show pretext as to the other plaintiffs and dismissed all of their claims. Petitioner asserts that the evidence could not have been more probative

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[14]It did so even though it was the respondent's "task to demonstrate that similarly situated employees were not treated equally." *Montgomery v. Yellow Freight System*, 671 F. 2d 412, 413 (10th Cir. 1982) *(quoting Burdine, supra* at 248), and even though respondent had failed to do so. The trial court found that "no proof was offered to the effect that a white person with a work record comparable to Ms. Vaughn's was kept on the job." (Pet. App. B-4).

as to Ms. Vaughn, and in fact was even more remote to Vaughn than to the claims of Gee and Crutcher as explained herein. The generalized *prima facie* proof was not considered convincing as to the other plaintiffs or on any other issue—it should not be sufficient here. Only this Court can now correct that remaining error.

IV. The decision below, besides its legal faults, is clearly erroneous on the facts and is unsupported by any relevant evidence.

While the foregoing analysis clearly establishes a basis for reversal, this Court may also hear a case under its supervisory powers to right a glaring wrong. Petitioner is aware of the Court's recent pronouncements on the application of the "clearly erroneous" doctrine in Title VII cases, *Pullman-Standard v. Swint,* 456 U. S. 273 (1982), but justice demands that cases should be decided on the evidence, and not based upon the subjective feelings of the trier-of-fact. The Court of Appeals in *Vaughn* determined that "[t]his is a close case and it may well be that the panel, if sitting as the trial judge, might have found that Westinghouse's proffered reason for plaintiff's disqualification was not pretextual." *Vaughn, supra.* 702 F. 2d at 139. (Pet. App. A-4). The Court nevertheless felt constrained by the standard of review set forth in Rule 52(a), Fed. R. Civ. P., to affirm. While the Court expressed a hesitance to disturb the findings and decision of a trial court, it had no hesitation about affirming a decision which disapproved an employer's business decision simply because it did not satisfy the trial court's belief that there was a better way to arrive at the decision, using "objective" factors.[15]

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[15]Judge Gibson, in his dissent in the first appeal (JA 356-57), urged that Title VII was never intended to require "uni-

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On such a record, there was simply no evidence to support a finding that Turnage's decision—and his was the only decision then in dispute—was based even in part on unlawful racial considerations. Westinghouse has been forced to pay tens of thousands of dollars in attorney's fees, costs and backpay to an employee who did not like her job and would not perform it, and who, to this day, still declines to try the job again. Logic and fairness demand a reversal of this result.

CONCLUSION

Circuit Judge Floyd R. Gibson filed a dissenting opinion when this case was before the Court of Appeals the first time. His words are equally applicable now:

> These facts are devoid of any connotation whatsoever of racial discrimination. The only discrimination against Vaughn was because of her poor and sloppy work. The Civil Rights Act of 1964 is not thought to have been passed to preserve sinecures for people, regardless of their race, who do not want to perform reasonably satisfactory work. Vaughn's productivity record was the worst of any of the operators. The Act here is being utilized as a shield to protect and reward sub-standard performance. (Gibson, J., dissenting) (JA 358).

The trial court and the Court of Appeals have had ample opportunity to correct this injustice. They have

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form production standards" or to mandate "how businesses should produce their products. This requirement would result in government supervision of each and every stage of the production process." Petitioner thought that such a criterion for finding liability was foreclosed by *Furnco, supra,* 438 U. S. at 572, which held that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."

declined to do so. Petitioner earnestly prays that, for the foregoing reasons, the judgments and bare majority opinions of the Courts below, which improperly find the petitioner liable for discrimination against Christine Vaughn, should be reversed with instructions to enter judgment for the petitioner.

Respectfully submitted,

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